HEIRS OF CARRIE BETHEL

IBLA 74-234 Decided March 22, 1977

Appeal from a decision of the California State Office, Bureau of Land Management, approving Indian allotment S-2799 and authorizing issuance of a trust patent with reservations of geothermal resources and various
rights-of-way.

Modified in part; affirmed in part.

1. Geothermal Resources--Indian Allotments on Public Domain: Lands Subject to

   A reservation of geothermal resources under the Geothermal Steam Act of 1970 may be inserted in a patent issued for an Indian allotment granted under the fourth section of the general allotment act.

2. Indian Allotments on Public Domain: Generally

   A reservation of geothermal resources must be imposed upon a patent issued for an Indian allotment under the fourth section of the General Allotment Act on land known to be valuable for such geothermal resources, even though the allotment is based upon settlement established prior to any withdrawal of the public domain and antedated the knowledge of the geothermal resources, but the application for patent was made subsequent to an application for withdrawal of the land to protect the geothermal resources.

3. Patents of Public Lands: Reservations

In a patent to public domain land, a reservation for ditches and canals constructed by authority of the United States, pursuant to the Act of August 30, 1890, need not be modified by a reference to the Act of September 2, 1964, as amended, 43 U.S.C. § 945a (1970).

APPEARANCES: Bruce J. Friedman, Esq., California Indian Legal Services, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Minnie Mike, as one of the probable heirs of Carrie Bethel, and on behalf of any and all heirs, has appealed from a decision of the California State Office, Bureau of Land Management, dated February 22, 1974, approving Indian allotment application S-2799 for the NW 1/4 NW 1/4 sec. 22, T. 1 N., R. 26 E., M.D.M., California, containing 40 acres, and indicating that a trust patent thereto would be issued subject to these reservations:

1. A right-of-way for ditches and canals constructed by the authority of the United States (Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945).

2. A right-of-way for a Federal Aid Highway (Act of August 27, 1958, as amended, 23 U.S.C. 317).

3. A right-of-way for a road and all appurtenances thereto, constructed by the United States through, over, or upon the land herein described, and the right of the United States, its agents or employees, to maintain, operate, repair, or improve the same so long as needed or used for or by the United States.

4. There will be reserved to the United States all the geothermal steam and associated geothermal resources in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits, upon compliance with the conditions and subject to the provisions and limitations of the Act of December 24, 1970 (84 Stat. 1566).

The heirs contend the State Office has no authority to impose the reservations set forth in the decision.

Carrie Bethel filed her application for the allotment on August 8, 1969, accompanied by a certificate of eligibility issued by the Bureau of Indian Affairs. The record indicates that Carrie Bethel, a Paiute Indian, moved onto the subject land in the late 1920's, and continuously resided on the land until the time of her death, February 5, 1974.

At the time of the original settlement by Ms. Bethel, the land was open to settlement, location, and entry under the general public land laws, including section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. § 334 (1970), as amended, 25 U.S.C. § 336 (1970), under which the application was made.

Sec. 4 of the Act provides in pertinent part:

> Where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land and one hundred sixty acres of nonirrigable grazing land to any one Indian; * * *

25 U.S.C. § 336 (1970).

Congress has recognized that allotment claims are of the same nature as homestead rights. Jim Crow, 32 L.D. 657 (1904). Section 4 of the Act of February 8, 1887, supra, does not confer upon an Indian a vested right to an allotment of public lands thereunder, and such right cannot be acquired prior to the fulfillment of all of the conditions set forth in the Act. Martha Head, 48 L.D. 567 (1922). But where an Indian voluntarily has made settlement upon land not reserved therefrom, the Department is without authority arbitrarily to deny her an allotment. Clark v. Benally, 51 L.D. 91 (1925). The Department has construed the fourth section of the general allotment act as one of the nonmineral land laws of the United States. Clark v. Benally, supra.

The Act of July 17, 1914, 30 U.S.C. § 121 et seq. (1970), provides for agricultural entry of lands withdrawn or classified as containing minerals now disposable under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 et seq. (1970). Section 3 of the Act of July 17, 1914, 30 U.S.C. § 123 (1970), provides:

> Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall locate, select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

The Act of June 22, 1910, 30 U.S.C. § 83 (1970), provides that lands classified or withdrawn as coal lands may be entered under the homestead or desert-land laws, with a reservation to the United States of coal in such lands.

CFR 2530.0-8(a)(3), provides:

> (3) An [Indian] allotment may be allowed for coal and oil and gas lands, with reservation of the mineral contents to the United States.

An Indian allotment may be allowed under section 4 of the Act of February 8, 1887, for oil and gas lands with reservation of the mineral contents to the United States. Clark v. Benally, supra. In Head, supra, the Department held that where the lands embraced in an allotment application under section 4 of the Act of February 8, 1887, are chiefly valuable for their coal deposits, the allottee must file an election as prescribed by the Act of March 3, 1909, 35 Stat. 844, 30 U.S.C. § 81 (1970), and take with a reservation of the coal to the United States, as required by the Act of June 22, 1910.

The provisions of the 1914 Act have been extended to embrace lands valuable for geothermal resources. The Geothermal Steam Act of 1970, Act of December 24, 1970, 84 Stat. 1566, 30 U.S.C. § 1001 et seq. (1970), provides:

> Sec. 25. As to any land subject to geothermal leasing under section 3 of this Act, all laws which either (a) provide for the disposal of land by patent or other form of conveyance or by grant or by operation of law subject to a reservation of any mineral or (b) prevent or restrict the disposal of such land because of the mineral character of the land, shall hereafter be deemed to embrace geothermal steam and associated

> geothermal resources as a substance which either must be reserved or must prevent or restrict the disposal of such land, as the case may be. This section shall not be construed to affect grants, patents, or other forms of conveyances made prior to the date of enactment of this Act.
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> Sec. 26. * * * As used in this Act, 'mineral leasing laws' shall mean the Act of February 25, 1920 (41 Stat. 437); the Act of April 17, 1926 (44 Stat. 301); the Act of February 7, 1927 (44 Stat. 1057); Geothermal Steam Act of 1970, and all Acts heretofore or hereafter enacted which are amendatory of or supplementary to any of the foregoing Acts; 'Leasing Act minerals' shall mean all minerals which, upon the effective date of this Act, are provided in the mineral leasing laws to be disposed of thereunder and all geothermal steam and associated geothermal resources which, upon the effective date of the Geothermal Steam Act of 1970, are provided in that Act to be disposed of thereunder; * * *.

[1] It is thus crystal clear that the statutes provide that reservation of geothermal resources may be imposed upon a patent issued for an Indian allotment granted under the fourth section of the General Allotment Act, supra. The argument by appellants that no mineral reservation may ever be imposed upon a trust patent issued for an approved Indian allotment has no merit.

Whether the circumstances surrounding this application for Indian allotment may except the proposed trust patent from reservation of the geothermal resources requires further analysis.

As pointed out in Head, supra, the right of an Indian to an allotment accrues only after fulfillment of all conditions set forth in the Act. The sine qua non in the allotment procedure is the filing of a proper application.

On August 8, 1969, when the subject application was filed for the NW 1/4 NW 1/4 sec. 22, T. 1 N., R. 26 E., M.D.M., that land was encumbered by application S-410 for withdrawal of the Mono-Long Valley Geothermal Area from disposal under either the nonmineral or mineral land laws. 1/ The application for withdrawal was noted

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1/ The subject lands, inter alia, were determined to be within the Mono-Long Valley Known Geothermal Resource Area as of the date of the Geothermal Steam Act of 1970, supra, 36 F.R. 6441, 6442, April 3, 1971.

to the land office records on February 7, 1967. As provided in 43 CFR 2351.3, posting of an application for withdrawal to the official land status records temporarily segregates the land in issue to the same extent the withdrawal would segregate. 43 CFR 2091.2-5.

[2] Upon filing of the subject application for an Indian allotment there remained no statutory impediment to issuance of a trust patent therefor, the right thereto having been established after verification of applicant's settlement prior to withdrawal of the land from settlement by Executive Order [E.O.] No. 6910, November 26, 1934, and compliance with the requirements of the General Allotment Act, supra. At the time of filing of the application in 1969, although the land was considered valuable for geothermal resources, there was no statutory provision for the reservation to the United States of the geothermal resources, as there was for the "Leasing Act Minerals," such as coal, oil, gas, potash and phosphate. 30 U.S.C. §§ 83, 121 (1970). Nor had there been any judicial determination whether geothermal resources were "mineral" within the context of the public land laws. 30 U.S.C. § 21 (1970).

In an action brought by the Attorney General of the United States pursuant to section 21(b) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1020(b) (1970), to determine whether the mineral reservation in patents issued under the Stock Raising Homestead Act of 1916, 43 U.S.C. § 291 et seq., (1970), reserved to the United States the geothermal resources underlying such patented lands, the Court of Appeals for the Ninth Circuit held that the reservation of "all coal and other minerals" is broad enough to include the geothermal resources. United States v. Union Oil Co. of California No. 74-1574 (January 31, 1977). Thus, the geothermal resources in the subject land must be considered to be "mineral" within the ambit of statutes and regulations authorizing the reservation of minerals. When land is valuable for a mineral substance, no disposal of the surface of such land may be made unless it is possible to reserve the mineral resource to the United States in the patent or conveyancing document. 30 U.S.C. § 21 (1970). As has been shown, patents under the fourth section of the General Allotment Act may be granted with appropriate reservations of the minerals. Clark v. Benally, supra. So, while Ms. Bethel had established her right to an Indian allotment for the subject land, any conveyance thereof from the government must be conditioned by reservation of the mineral values therein, known at the time her application for allotment was filed with the Bureau of Land Management. Clark v. Benally, supra. As the land is known to be valuable for geothermal resources, any

patent for such land issued after December 24, 1970, must contain a reservation of the geothermal resources to the United States. 30 U.S.C. § 1024 (1970). Reservation of the geothermal resources in the patent as proposed by BLM is eminently correct. Cf., Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967).

We turn now to appellants' arguments against reservation of rights-of-way in the patent.

[3] All public lands west of the 100th meridian taken up by allotment, sale, homestead, or other form of disposition, subsequent to the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945 (1970), as to which there is no claim by reason of settlement, occupancy, or otherwise, prior to that date, are subject to the reservation provided by that act, to be expressed in the patent, for right of way for ditches or canals constructed by authority of the United States. Clement Ironshields, 40 L.D. 23 (1911). Appellant argues that the patent should carry a notation that, in event of exercise of the 43 U.S.C. § 945 right-of-way by the United States, the patentees or successors have a right to just compensation pursuant to 43 U.S.C. § 945a (1970). We do not agree. No constitutional right to just compensation arises when an easement is exercised pursuant to 43 U.S.C. § 945. The sole right to compensation in this instance arises from the statutory authority of 43 U.S.C. § 945a. This statute did not repeal the Act of August 30, 1890, and did not in any way affect the Government's reservation of a right-of-way as set forth in 43 U.S.C. § 945. See United States v. 106.64 Acres of Land, 264 F. Supp. 199, 201 (D. Nebraska 1967). The reservation in the trust patent correctly refers only to 43 U.S.C. § 945.

Appellants contend that no highway right-of-way may be reserved in the trust patent except if procedures set out in 23 U.S.C. § 317 and 25 U.S.C. § 327 are followed. The record shows that the Federal Aid Highway affecting the land in issue was approved May 29, 1936, following procedures then in effect. The provisions of 25 U.S.C. § 327 were not applicable as the land was not then Indian land. As the right-of-way for the Federal Aid Highway was in existence when the subject allotment application was filed, the reservation for a Federal Aid Highway in the trust patent is proper under sec. 317, Act of August 27, 1958, 23 U.S.C. § 317 (1970).

Appellants contend that unless allowed by United States law, the Bureau of Land Management may not create any road rights-of-way for the United States through the Indian allotment at issue. It is settled in this Department that where roads, trails, bridges or other improvements have been made on public lands and are being maintained by authority of law and the lands are thereafter disposed of, the patent may except the portion of that land that is

devoted to such improvements. Instructions, 44 L.D. 513 (1916); 43 CFR 2800.0-1(b). If any road was constructed by the United States through the land at issue before August 8, 1969, the date upon which the allotment application was filed, imposition of the reservation is mandatory. Although properly imposed as written, the reservation is not effective as to any road or other improvement initiated after August 8, 1969, the date on which this application was filed. See Access Road Construction, 65 I.D. 200, 202 (1958).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is modified as to the effect of reservation #3, and affirmed as to reservations #1, #2, and #4.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge